

DUE PROCESS: A PUBLIC DIMENSION

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I. INTRODUCTION

The convenors of this symposium have asked us to think about due process. Much of the due process literature in the United States considers how individuals can defend themselves against the power of the state¹ and focuses upon equipping individuals for their confrontations with the state.² Some commentators see the purpose of procedural safeguards as enhancing accuracy — that a correct result is achieved when state and individual clash.³ Others look beyond this goal and articulate aspirations for due process in addition to generating acceptable outcomes. Thoughtful commentators such as Jerry Mashaw

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1. See generally *NOMOS: DUE PROCESS XIII* (J. Pennock & J. Chapman, eds. 1977).

2. The United States Supreme Court has developed a doctrinal approach in which, if a protected liberty or property interest is asserted, the question is "what process is due?" See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976).

3. Illustrative are Justice Powell's opinion in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and Justice Rehnquist's opinion in *Allen v. Illinois*, 106 S. Ct. 2988, 2995 (1986).

and Frank Michelman have spoken about aspects of due process that advance individual dignity and efficacy.⁴

In this essay, I suggest a related but somewhat different set of issues for inclusion in our understanding of due process. For me, fairness to the individual and the generation of acceptable outcomes does not exhaust the content of due process theory. These comments are a preliminary effort to articulate another dimension of that theory. I seek to analyze the effects of and upon a third group, perhaps best described as the "public," in the ongoing process of dispute resolution. I am interested both in the role of the public in the process, and the function of the process for the public.⁵

My concern to include the public in a conception of due process is not driven only by thoughts that the public's role is to control state power or to augment individual dignity. Rather, I believe that process is better understood when viewed as encompassing more than an atomistic confrontation between an individual and the state. My working assumption is that the public/process relationship is important and worth thinking about as we consider how much and what "process is due."

My endeavor is complicated by at least two problems. First, how should I name this entity that exists in addition to the state and the individual? As the title indicates, I have chosen to use "the public," but not without hesitation. The word "public" crops up frequently in the language of due process, of procedure, and of courts. Concerns about procedural due process arise in the context of "public" decision-making; so-called "private" decisionmaking is not circumscribed by the same requirements of procedural fairness.⁶ Many who write about procedure speak of "private" lawsuits,⁷ of "public law litigation,"⁸ of

4. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153.

5. These comments are related to both Bob Cover's and Frank Michelman's critique that Ronald Dworkin posits his judge, Hercules, without including the context in which the judge acts or the dependence of the judge upon others. See Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1626-29 (1986); Michelman, *The Supreme Court, 1985 Term, Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 75-77 (1986).

6. See *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978); Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV., 1289, 1296 (1982).

7. See, e.g., *In re Reporters Comm. For Freedom of the Press*, 773 F.2d 1325, 1335-36 (D.C. Cir. 1985).

8. See generally Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

"public" versus "private" rights,⁹ of "public," court-based adjudication versus "private" arbitration or other processes,¹⁰ as if we all shared an understanding of what falls within these categories.¹¹

Despite its omnipresence and imprecision, "public" seems an apt term in this effort to flesh out the image of a third entity within a due process framework. The public is, of course, already present when state and individual clash. First, those individuals who actually confront state power are a subset of the public. Second, the public is the state. Our employees — judges, jurors, magistrates, administrative law judges or the like — have the power to speak for the public and, in theory, according to norms generated by the public. Yet, in my view, the public is somehow also a third party, apart from both individuals and the state, and playing a variety of roles, including those of witness, audience, critic, foil, and commentator.

By using the word "public," I hope to denote a political community, the citizenry of the United States, but I do not intend, and I hope will not be read, to suggest that this citizenry is a unified group. That the United States is heterogeneous is obvious. There are many "publics," and thus many witnesses, audiences, critics, foils, and commentators.¹² In fact, it is partly because of the multitude of groups, each with its own values and norms, that I am concerned about the need to articulate a public dimension. Adjudication must always occur against a backdrop of conflict over what norms should govern. Hence, while I use the words "public," "our," and "we," it is always with a sense that there are many distinct "ours" and many "publics,"

9. See, e.g., *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 585-86 (1985). See generally Resnik, *The Mythic Meaning of Article III*, 56 U. COLO. L. REV. 581, 592-603 (1985). Critical commentary about the limits of a "private" rights model is offered by Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985).

10. See Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1365-66 (1982); St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 MICH. L. REV. 1137 (1977); cf. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 953-55 (1979).

11. The idea that a problem exists in understanding the parameters of "public" spheres is not new. See, e.g., *PUBLIC AND PRIVATE IN SOCIAL LIFE* (S. Benn & G. Gaus eds. 1983); Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986); Seidman, *Public Principle and Privatized Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006 (1987); Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986); *Symposium: The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982). The insights developed in these commentaries have not been used in many of the conversations about drawing public/private distinctions in procedure.

12. See Cover, *The Supreme Court 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

My second difficulty comes in attempting to explain how and why the presence of the public affects procedure. Below, I review some of the rationales extant in the legal literature. The dominant themes are that Anglo-American jurisprudence has a tradition of public participation, that the process educates the public and provides catharsis, and that the public acts to check decisionmakers and to enhance accuracy. Thereafter, I suggest another explanation: that the interaction between process and public is important and assists in the development of legal norms about the merits of disputes and about how disputes should be handled. All the explanations offered rest upon assumptions, as empirical documentation of the process/public interaction is impossible. All the explanations offered are also subject to criticism, at least some of which is provided below.

One final comment by way of introduction. This essay is an effort to begin a conversation about a public dimension in adjudication and dispute resolution. We are currently in an era of interest — on both the theoretical and practical sides — in procedural modeling. Over the past two decades, many proceduralists in the United States have become increasingly intrigued by what are called “alternatives” to adjudication.¹³ In the current enthusiasm for “alternative dispute resolution” (ADR), many urge courts to adopt or to incorporate procedures such as mediation, judicial settlement conferences, arbitration, “mini” trials, and “summary” trials.¹⁴ In 1983, the Federal Rules of Civil Procedure were amended to affirm a role for federal judges as facilitators of settlement and to authorize judges to advocate “extrajudicial” means for the resolution of disputes.¹⁵ Yet aside from an occa-

13. See, e.g., the recently begun reporter, *Alternative Dispute Resolution Rep.* (BNA) (1st ed. Apr. 30, 1987). Of course, ours is not the first generation to be intrigued by responses to disputes other than adjudication by judges. See, e.g., *The Federal Arbitration Act of 1925*, 9 U.S.C. §§ 1-14 (1982); H. SCOTT, *THE COURTS OF THE STATE OF NEW YORK: THEIR HISTORY, DEVELOPMENT AND JURISDICTION* 43-44 (1909); Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985) (discussing *The Federal Arbitration Act of 1925*, 9 U.S.C. §§ 1-14 (1982)).

14. See, e.g., Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985); Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985).

15. FED. R. CIV. P. 16(c)(7); see also C. SERON, *THE USE OF STANDARD PRETRIAL PROCEDURES: AN ASSESSMENT OF LOCAL RULE 235 OF THE NORTHERN DISTRICT OF GEORGIA* (Fed. Judicial Center, 1986). The Court of Claims just joined the bandwagon. See, Notice to Counsel and General Order No. 13, Ct. Cl. (Apr. 15, 1987).

sional comment about the pleasures of privacy in dispute resolution,¹⁶ the literature of ADR is virtually silent on a role for the public in the processes promoted. I believe that this silence is an error and that we ought to be self-conscious about decisions to provide either for private or for public procedures. Below, I offer some comments on what might influence thoughts about "public" and "private" processes. I do not write in a spirit of definitiveness but rather in the hopes of sparking others to join with me in thinking about this issue.

II. THE ROLE OF AN AUDIENCE: "PUBLIC" ACCESS

At first glance, this inquiry appears simple. A ready answer to why one would carve out a role for the public comes with the words "Star Chamber." Images of closed, secret, oppressive processes and of state exploitation of its power spring readily to mind. But explaining the harms of closure and the benefits of openness is more complex than might be anticipated. Such explanations have been called for, in the context of adjudication,¹⁷ when judges order that trials be closed or that records be sealed, and either parties or non-parties (often members of the media) argue for openness. As a consequence, doctrines about access to court processes have evolved, as judges have interpreted the first, sixth, and fourteenth amendments to the Constitution and the common law.¹⁸

My interest here is not in the development of such doctrines or in the reach of the "right" of access. Rather, I am intrigued by what judges describe themselves as accomplishing when crafting or limiting a role for the public. One of the most fulsome examples of judges speaking to this question is *Richmond Newspapers, Inc. v. Virginia*.¹⁹ In that case, a criminal defendant, John Paul Stevenson, was facing his fourth retrial on murder charges. His lawyer asked that the trial be closed to the public. The prosecutor did not object, and the state trial judge ordered the courtroom cleared. Reporters challenged the

16. See, e.g., L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION 11 (1986) (advantages of arbitration include that the "dispute can be left private since the decision is not necessarily a public document . . .").

17. Administrative law has also responded to these issues. See, e.g., Freedom of Information Act, 5 U.S.C. § 552 (1982); Dunn, *Judging Secrets*, 31 VILLANOVA L. REV. 471 (1986).

18. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality opinion) (discussed *infra* notes 19 to 26 and accompanying text); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339 (3d Cir. 1986); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985).

19. 448 U.S. 555 (1980) (plurality opinion).

closure, but the judge declined to vacate the order, and instead, excluded the press and public from the courtroom.²⁰

Seven justices of the United States Supreme Court agreed that the closure of the courtroom was unconstitutional, although they could not readily agree on the nature of the unconstitutionality. Six opinions were filed in support of the judgment.²¹ The differences among the justices centered on whether the right infringed was protected by the first or the sixth amendments, whether the Court ought to mandate access for both civil and criminal trials, and whether the holding in the case necessarily overruled prior precedents.²² Seven justices agreed, however, that there was something wrong with excluding the public — at least in the instance at hand.

Chief Justice Burger, joined by Justices White and Stevens, wrote an opinion that gives three rationales for public access to criminal trials.²³ A first argument is founded in history. The Chief Justice described an “unbroken, uncontradicted history . . . of openness” of criminal trials.²⁴ Burger claimed that, as a matter of historical fact, the public has always been permitted to attend such trials and therefore that the public should continue to be permitted to attend such proceedings.

I have three problems with a claim of openness based upon history. The first is that, as an empirical matter, the claim may be in error. I have substantial doubt about anyone’s ability to capture accurately a picture of how trials were conducted in the past. While the Chief

20. *Id.* at 556-61.

21. Chief Justice Burger was joined by Justices White and Stevens in a plurality opinion holding a constitutional right of access under the first amendment to criminal trials. *Id.* at 580. Justice Brennan, joined by Justice Marshall, argued that the first amendment gave a right of access to all trials. *Id.* at 598. Justice Stewart wrote separately to discuss the parameters of what he believed to be a first amendment right to all trials. *Id.* at 599. Justice Blackmun joined the judgment but argued that the Court should have found a sixth amendment right of open trials and of other proceedings. *Id.* at 603. Justice Stevens also wrote a concurrence in which he stressed the need for protection of the press. *Id.* at 584. Justice Rehnquist dissented. *Id.* at 604. Justice Powell did not participate.

22. For example, Justice Blackmun argued that the holding in *Richmond Newspapers* vindicated his partial dissent in *Gannett Co. v. DePasquale*, 443 U.S. 368, 406 (1979). See 448 U.S. at 601. Justice Stevens argued that the Court’s decision in *Richmond Newspapers* supported his views on the need for press access. *Id.* at 584.

23. 448 U.S. at 576. Note that, at least in this case, the Chief Justice was not deterred by the fact that such rights are not expressly stated in the text of the Constitution. *Id.* at 579 (rights not “enumerated” may still be recognized).

24. *Id.* at 573. For more history, see Max Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381 (1932).

Justice asserted that he had found an "unbroken" line of open access to trials,²⁵ my guess is that practices probably varied; in some places, with little documentation or fuss, judges may well have ordered proceedings closed. In fact, in the transcript of the closure hearings in *Richmond Newspapers* itself, the trial judge and lawyers shared recollections of trials that had been closed to the public.²⁶ Furthermore, in recent years, energetic social scientists have substantially increased our knowledge of trial court practices. Reports describe variations in trial practices from jurisdiction to jurisdiction²⁷ and demonstrate that cases with written opinions are atypical when compared to the bulk of cases filed.²⁸ Given the spottiness of even contemporary data, I question the completeness and accuracy of accounts about how trials of earlier centuries were conducted and who attended them.²⁹

But the problems of history are not limited to issues of recovery of artifacts. Procedure changes over time. For example, we have eliminated some elements of trial (such as jurors with direct knowledge of the disputed events) that we used to cherish.³⁰ It is not self-evident that the trials of the past provide adequate instruction on contemporary process. Finally, even if we knew the history and even if the modes of process had not changed, the question remains whether what was done in the past was good or bad. Reflection upon past practices may lead to change. For example, a New York court recently rejected a time-honored practice in that jurisdiction of sealing courtrooms when judges instructed jurors.³¹ Simply because we have, in the past, either included or excluded the public does not confirm that we should do the same today.

While I am uncomfortable founding an argument for a public role in history, I am also uncomfortable assuming that history has nothing

25. 448 U.S. at 573.

26. Appendix, *Richmond Newspapers*, at 18a.

27. On plea bargaining, see Schulhofer, *No Job Too Small: Justice Without Bargaining in the Lower Criminal Courts*, 1986 AM. B. FOUND. RES. J. 519. On diverse handling of asbestos litigation, see D. HENSLER, W. FELSTINER, M. SELVIN, & P. EBENER, *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* (Inst. for Civil Justice, Rand Corp. 1985). See generally Trubek, *Studying Courts in Context*, 15 LAW & SOC'Y 485 (1980-81).

28. See Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983) [hereinafter *Ordinary Litigation*].

29. For one account, see M. TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY, 1789-1816* (1978).

30. Kershen, *Vicinage* (pt. 3), 30 OKLA. L. REV. 1, 75-76 (1977).

31. *People v. Venters*, 124 A.D.2d 57, 511 N.Y.S.2d 283 (App. Div. 1987) ("however hoary and time honored such a practice may be, [it] does not pass constitutional or statutory muster").

to teach us. Whether "unbroken" or sporadic, whether right or wrong, there is some tradition of a role for the public in adjudication. In the United States, we have held as a value the practice of permitting non-litigants to attend some court proceedings and have understood courthouses as "public" places.³² While an explanation for a public dimension cannot rest on the fact of tradition alone, we must acknowledge our history and attempt to learn from it.

The Chief Justice provided a second argument for public access to criminal trials. According to his opinion, there has been "widespread acknowledgement . . . that public trials had significant community therapeutic value."³³ How did, or does, the therapy work? The Chief Justice linked openness to the special qualities of the criminal trial. In his view, when a "shocking crime occurs," the community needs a means to express "natural human reactions of outrage and protest."³⁴ Without public trials, we run the risk of "self-help . . . of vigilante 'committees.'"³⁵ But, when the public is able to watch "justice done" and to see "retribution," "community catharsis" results.³⁶

This catharsis rationale has problems. First, assuming for the moment that some members of the public need to vent their emotions when they learn about the commission of a crime, I wonder whether attending trials, reading newspaper reports, or seeing televised portions of trials provides a suitable vehicle. The trials in the United States that I have attended, either as a spectator or as a litigator, seem remarkably unemotive. In contrast to other rituals, such as some religious services or rock concerts, much of the style, pace, and manner of a trial seems designed to rein in and to control emotions. Indeed, at times when emotions run high, such as during the Chicago Seven trial, courtrooms are cleared, participants admonished — and sometimes even bound and gagged.³⁷ During such events, judges and commentators discuss problems of "order in the court."³⁸ Some of the

32. See, e.g., 448 U.S. at 578.

33. *Id.* at 570.

34. *Id.* at 571.

35. *Id.*

36. *Id.*

37. *Illinois v. Allen*, 397 U.S. 337 (1970) (trial judge may order that disruptive defendant be removed from the courtroom or be bound and gagged); see also *Holbrook v. Flynn*, 106 S. Ct. 1340 (1986) (uniformed state troopers in courtroom). See generally *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972); *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972), *on remand*, 357 F. Supp. 949 (N.D. Ill. 1973), *on remand*, 370 F. Supp. 1304 (N.D. Ill. 1973), *aff'd*, 502 F.2d 813 (7th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); CONTEMPT: TRANSCRIPT OF THE CONTEMPT CITATIONS, SENTENCES, AND RESPONSES OF THE CHICAGO CONSPIRACY 10 (1970).

38. See generally N. DORSEN & L. FRIEDMAN, *DISORDER IN THE COURT* (1973).

concern is based upon experience. Infamous cases such as *Franks v. Magnum*³⁹ and *Moore v. Dempsey*⁴⁰ remind us of the powerful influences of emotions and the darker expressions of communities' passions on the fate of individuals charged with crimes. Surely, the audience-as-lynch-mob was not the kind of "catharsis" that the Chief Justice had in mind.

Moreover, even if trials could be cathartic events for the public, trials often occur months after the events at issue. In *Richmond Newspapers*, the alleged crime had been committed in December of 1975, a first trial was held in July of 1976, and the trial at issue occurred in September of 1978.⁴¹ Did the Chief Justice believe that "community concern, hostility, and emotion" would be satiated by an open trial, no matter how long the interval between crime and trial, no matter the number of trials? Further, the fact of an open trial is, in and of itself, no assurance that the community will either attend or learn of the proceedings. Why believe that attention is paid or lessons learned?⁴² Why should we assume that trials are effective vehicles by which members of the public, or even judges, lawyers, and perhaps disputants, express angst, release tension, or achieve purgation and spiritual renewal?

I am skeptical about whether even the direct participants obtain much by way of psychic relief from contemporary modes of adjudication. I am also not confident that seeking catharsis in adjudication is a good idea. Yet, I do believe trials have the capacity to generate emotion. What trials can provide is a sense that something is happening as the witnesses speak. That which unfolds may sometimes be dull and dry, and we may need a good deal of background information to interpret the proceedings. Nonetheless, trials (and some of the other forms of dispute resolution) are times when stories are told. As the success of soap operas suggests, the unfolding of a story in bits and pieces can capture our interest and perhaps can even provide a sense of vicarious participation. Further, the stories generated may become the shared tales of a variety of citizens — across social and ethnic

39. 237 U.S. 309 (1915).

40. 261 U.S. 86 (1923).

41. 448 U.S. at 559-62.

42. See, e.g., Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1 (1984); Ellickson, *Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986). For discussion of the impact of watching trials on the audience, see Barber, *Televised Trials: Weighing Advantages Against Disadvantages*, 10 JUST. SYS. J. 279 (1985).

boundaries. While I am reluctant to embrace a theory of trials as catharsis, I am at ease with an acknowledgment of trials as vehicles for generating potentially powerful narratives.

Chief Justice Burger saw a third purpose to open criminal trials. Relying on Wigmore and Bentham, the Chief Justice described trials as having "an educative effect," as "an opportunity both for understanding the system in general and its workings in a particular case."⁴³ The education is supposed to result in "a strong confidence in judicial remedies."⁴⁴ This claim rests upon a series of assumptions: that people know what happens in courtrooms, that they understand the procedure, appreciate what they see, and as a result, feel positively about the criminal justice system in general.⁴⁵ Certainly, the Chief Justice is correct that, with public access, the information that is generated becomes available, but the uses to which the information will be put are far from certain.

While arguments based upon catharsis and education assume that the process can provide for the public, another claim (of which Justice Brennan has been a prime spokesperson) is based upon the notion that the public can do something for the process. Justice Brennan, writing a concurrence joined by Justice Marshall in *Richmond Newspapers*, argued that the audience was "an indispensable element of the trial process itself."⁴⁶ Justice Brennan grounded the right of public access on the first amendment, which he believed played a "structural role"⁴⁷ by encouraging public debate. While sharing the Chief Justice's interest in history, Justice Brennan drew a different lesson: "public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.'"⁴⁸ For Justice Brennan, the public was a "safeguard,"⁴⁹ and "public scrutiny" was essential to "the way in which law should be enforced and justice administered."⁵⁰

43. 448 U.S. at 572.

44. *Id.* (quoting 6 J. WIGMORE, EVIDENCE § 1834, at 438 (rev. ed. 1976)).

45. Reports on jury comprehension of instructions, for example, suggest that jurors do not understand a good deal of standard legal language. See A. ELWORK, B. SALES, J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982); see also Barber, *supra* note 42 (psychologists generally report low rates of retention of information).

46. 448 U.S. at 597.

47. *Id.* at 587 (emphasis in the original).

48. *Id.* at 592 (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)).

49. *Id.*

50. See *id.* at 593 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)). See also Holmes' comment in *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884):

The claim of the public-as-a-control needs some sorting out. How exactly does the presence of an audience serve to check judicial power? In the federal system, unlike some state court systems, federal judges' jobs are for life. Judges need not depend upon favorable public opinion to maintain their employment.⁵¹ Further, while Justice Brennan assumed a public interested in "the government's fair and equal dealing with all,"⁵² can we be so sure that the public will be sympathetic to norms of fairness, that the public has standards at least as high, if not higher, than judges?⁵³ The public can only function as a political check if the public has the power to control and standards by which to assess judicial behavior.

Perhaps Justice Brennan was making a psychological, rather than a political, claim. He might have assumed that judges are invested in, or could be taught to be invested in, reputations for fairness. Judges might be "civilized" by the requirement of having to act in front of the public.⁵⁴ Recall, however, the assumptions embedded in Chief Justice Burger's argument for the cathartic function of criminal trials. The Chief Justice saw criminal trials as vehicles for expression of hostility, retribution, and blame. Might not an audience who shares those views delight in an angry judge? Justice Brennan must have assumed that the community of spectators would hold values other than those expressed by the Chief Justice, and that such an audience would seek dispassionate, rather than "vindictive," justice.⁵⁵ Such as-

It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

51. Compare the position of some state judges, such as the former Chief Justice of the California Supreme Court. See, e.g., Endicott, *Bird Lovers, Haters Get Set for '86*, L.A. TIMES, Jan. 27, 1985, § IV, at 1, col. 1.

52. 448 U.S. at 595.

53. See, e.g., NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS (1st Report, 1984; 2d Report, 1986) (discrimination against women); NEW YORK UNIFIED COURT SYSTEM, OFFICE OF COURT ADMINISTRATION, REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS (1986) (also discount against women).

54. See Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISC. L. REV. 1359, 1377-87 ("prejudiced persons are least likely to act on their beliefs if the immediate environment confronts them with the discrepancy between their professed ideals and their personal hostilities against out-groups"); see also Rose, *supra* note 11, at 779-81 (the values of sociability).

55. See Ambrogio Lorenzetti's fresco, *Allegory of Good Government*, in Sienna's Palazzo

sumptions certainly have appeal; both the rhetoric of fair-minded judgment and the images of justice⁵⁶ support arguments that judges will be self-conscious, at least in public, about living up to the ideals of equal treatment and impartiality.

Justice Brennan had another rationale for public access — that the presence of the public enhanced factfinding in two respects.⁵⁷ First, witnesses unknown to the parties might step forward. While such a belief animated the writing of Perry Mason's stories, I am skeptical about the frequency with which public proceedings turn up new evidence.⁵⁸ The second aspect of Brennan's accuracy claim was that those who testified would speak more truthfully in public than if permitted to testify in private.⁵⁹ This is an empirical question. Other decisionmaking processes are based upon the opposite assumption, that people speak more truthfully in private than in public. For example, many requests for comments on the desirability of affording tenure to an academic are accompanied by promises of confidentiality. The premise is that commentators will be more truthful if they know that their views will not be subjected to public scrutiny.

These five rationales — history, catharsis, education, control, and accuracy — are what one finds in the legal literature about why the public has a role to play in some adjudicatory procedures, most typically in criminal trials. All the arguments rest upon assumptions, most of which are unverifiable. I think that these arguments do not capture all that might be said, albeit again based on unverifiable assumptions, about the public's role in process.

First, while the education and control arguments suggest some kind of interaction between public and process, these arguments do not explore much about the nature of the interaction. Consider one's own experiences with public and private moments. I speak differently in public than in private, in moments such as this, when I know, or

Publico, in which three "Justices" are depicted, one labeled "Distributive Justice," one labeled "Commutative Justice", and one labeled "Vindictive Justice," discussed in S. EDGERTON, JR., PICTURES AND PUNISHMENT: ART AND CRIMINAL PROSECUTION DURING THE FLORENTINE RENAISSANCE 32 (1985).

56. See Curtis & Resnik, *The Images of Justice*, 96 YALE L.J. 1727 (1987).

57. 448 U.S. at 596-97.

58. But see Stern, *The Right of the Accused to a Public Defense*, 18 HARV. C.R.-C.L. L. REV. 53, 80-82 (1983) (effect of publicity was to enable defense to have access to evidence that would otherwise have been unavailable).

59. See 448 U.S. at 597 (citing 3 W. BLACKSTONE COMMENTARIES); see also Stern, *supra* note 58, at 54 (innocent rape defendant enabled to defend by virtue of atmosphere created by trying the case to the public via the press).

hope, that strangers read my words than in moments when I choose who receives my words. I try to interact with an audience. I hope that my behavior affects the audience, and I believe that the presence of an audience affects my behavior. Note that I am not making a claim that the words I speak in one setting are intrinsically "more true" than the words spoken in the other. Rather, I claim a difference exists when strangers, rather than only those invited, can attend.

The difficult question is whether the difference matters. To consider this problem, return to *Richmond Newspapers*. The day after the trial was closed, the trial judge entered a brief order. We learn only that, after the prosecution put in evidence, the defense counsel

moved . . . to strike the . . . evidence on grounds stated to the record, which Motion was sustained by the Court.

And the jury having been excused, the Court doth find the accused NOT GUILTY of Murder⁶⁰

With a courtroom closed, the interaction between public and process is limited. Not only can we not control or be educated, we cannot share or participate in any way.⁶¹

The notion of interaction is, of course, related to the control and education arguments made by others, but there are some distinctions. For example, when Justice Brennan spoke of the public as a safeguard, he seemed to assume that when judges work within reach of the public, we the public can check to be sure that judges are acting in accordance with established norms. In other words, there are norms out there, and the public can look to those norms to see if judges have done their duty.

For me, the situation is more fluid. I am not so confident that norms are prefixed, independent of the disputes they govern. Rather, I believe that the norms are generated in the course of the interaction among disputants and adjudicator, and among disputants, adjudicator, and the public. This is an interaction over time, during which the polity develops, learns about, and changes the norms that govern disputes.

This interactive, norm-generative function seems important because, as I mentioned at the outset, "we" are not a single, homogeneous community. Rather, we are a series of publics, with values at great variance, and we live in fragile coexistence.⁶² Perhaps if "we" had

60. The record, as quoted by the Chief Justice at 448 U.S. at 562 (footnote omitted).

61. Professor Meiklejohn ascribed to the first amendment a related function; the openness of the society created the possibility of achieving shared understandings and political commitment. See A. MEIKLEJOHN, *FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT* 102-07 (1948).

62. See Cover, *supra* note 12.

well-defined mores, I would not wonder about how judges dealt with disputes. Perhaps if "we" were an insular community, our wise elders might be entrusted with responding to disputes, and we would not require information because of our shared knowledge of the guiding principles.⁶³ But our society is not communal in that sense.⁶⁴ For better or worse, there are a multitude of communities, and we cannot sit back in the comfort that judges will deal with our conflicts within a fabric of rules that we share and that nurture us. We cannot even know of our conflicts or our norms.

One way to illustrate this point is to consider "public" norms in transition. For example, this society is greatly confused about its treatment of women. On one hand, "we" espouse notions of fair treatment while, on the other, "we" tolerate a substantial amount of abuse of women.⁶⁵ A few years ago, domestic violence was considered to be unfortunate, but not always legally impermissible, behavior. Police often did not report complaints, and complainants were sometimes encouraged to adjust to abusive situations.⁶⁶ More recently, at least at a formal level, "we" have come to perceive such abuse to be unacceptable.⁶⁷

If one understood a role for the public in adjudication as based on the need for public education, this example would suggest that litigation about abuse has enabled us to learn about violence that might otherwise have remained invisible. If one understood a role for the public as based on the need for control of judges, then one would argue for public access to ensure that the "new" norms are applied in such cases.⁶⁸

63. But see the comments of the defendant's lawyer in *Richmond Newspapers* when arguing for closure. He said, "this is a small community, it's not like in a big city where you've got three hundred thousand people [from whom to choose jurors]." Appendix at 15a.

64. See Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983); Levinson, *Constituting Communities Through Words that Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440 (1986); Mann, *Law, Legalism, and Community Before the American Revolution*, 84 MICH. L. REV. 1415 (1986).

65. Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

66. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984).

67. See Nix, *Police Step Up Attack on Domestic Violence*, N.Y. TIMES, Dec. 31, 1986, at 12, col. 1; See generally Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS L. REP. 191 (1986).

68. While Bentham saw the importance of public access for control of decisionmakers, he was prepared in matters involving women and family (as well as a few other instances) to qualify his arguments about the importance of publicity. 1 J. BENTHAM, BENTHAM'S RATIONALE OF JUDICIAL EVIDENCE 560 (1827).

Because I also see an interactive, generative role for the public, I use this example to comment on the creation of the new norm. How did the transition from acceptance of violence against women to at least some questioning of that violence⁶⁹ occur? My guess is that public participation in disputes between abusers and abused was one of several factors that influenced this development. We the public sit not only to learn about norms and to prevent application of the "wrong" norm, but also to be part of the process of changing norms. We create our social rules out of individual sagas of claims of right. By understanding that a role for the public in process is based in part on this need for interaction, we stress the expressive qualities of procedure, the use of process as one way to give meaning to cultural values such as dignity of individuals. Further, by having public participation, we gain the possibility of generating shared narratives of powerful significance. Process may provide a vehicle for — briefly — creating a shared community and, of course, process may also be the occasion by which the war of our many communities is plainly revealed.⁷⁰

Take the recent case involving the conflicting claims of right to parenthood of Mary Beth Whitehead and the Sterns.⁷¹ At great personal pain to the disputants, we all sat as an audience, considering aspects of family life some of us had not known to be possible. The emotive power of conversations about the issue were, I believe, partly a function of the way in which the story unfolded. No abstraction, no 49-page opinion, could drive us — and divide us — as profoundly as the narrative created by the daily unfolding of the case. While learning about outcomes can teach us about the "law as power," we can only experience the "law as meaning" if we have more than outcomes with which to work.⁷²

In short, because I believe that adjudication is one aspect of the political life of the United States, I believe that our polity needs to play some role in that process. The process is us; the conflict is ours. We should not try to deny, alienate, or obliterate our disputes, for if we do, we lose important parts of our own stories, which are needed

69. Violence against women is still acceptable to some. See C. MACKINNON, *FEMINISM UNMODIFIED* (1987) (esp. ch. III, Pornography).

70. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (a woman's claim for treatment equal to that afforded men in the tribe versus a tribal claim for discriminatory treatment of women).

71. *In re Baby "M,"* 217 N.J. Super. 313, 525 A.2d 1128 (Super. Ct. Ch. 1987); *certification of appeal and limited visitation granted*, 107 N.J. 140, 526 A.2d 203 (1987).

72. Cover, *supra* note 12, at 18.

to inform us about how we should understand and govern ourselves. Finally, even if we wanted to avoid such conflicts, those whom we empower would determine outcomes and enforce them in our names, and we must accept responsibility for such actions.

Thus, I offer a sixth rationale for public in process: interaction to assist in the expression and generation of norms. But like the five that preceeded it, interaction/norm generation has some problems. First, while sociologists and anthropologists attempt to capture the process of norm generation, no one can assert with assurance how it works. Perhaps the unfolding sagas confuse us, distract us, or overwhelm us with a force disproportionate to their content.⁷³ Second, adjudication is but one arena for such interaction. Other processes may be as well, if not better, suited to the task.⁷⁴ Third, the examination of conflict may be destructive, rather than generative. Too much exploration of the differences among us may result in polarization. Fourth, many factors, including media decisions about what events are the most intriguing, affect which sagas take hold of our imaginations. That dependency upon others to cover, translate, and communicate may create profound distortions. Fifth, why assume that articulation of either disputes or norms is generally valuable? Perhaps it is creative to leave conflict unexplored, to protect us from having to articulate rules that may be in tension with societal aspirations.⁷⁵

I am sure there are other problems with interaction and norm generation as a rationale for a public role. But I will move on to uncover a few more of the complications in thinking about a public dimension to adjudication and dispute resolution. Thus far, the commentary has been focused upon trials. If one were to believe, for any of the reasons set forth above, that the public had some role to play in process, two questions remain: in which processes, and what kind of role?

III. THE MODES OF ADJUDICATION

As the discussion of *Richmond Newspapers* illustrates, much of the caselaw on a public role has arisen in the context of criminal trials. Does a focus on criminal trials, as contrasted with other modes of

73. R. NISBETT & L. ROSS, *HUMAN INFERENCE* (1980) (vividness of information can lead to false attributions).

74. See Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980).

75. See, e.g., Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). Compare Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J.L. REF. 933 (1985).

adjudication, make sense? The law of procedure and of due process has assumed the coherence of such distinctions. I want to raise a few of the problems with drawing such lines in the context of considering the public's role. By suggesting that the distinctions are not particularly persuasive in this regard, I am not suggesting that these distinctions have no utility at all.⁷⁶

One might argue that "we" the public have some role to play in criminal, but not in civil, trials because the criminal law attempts to attach moral culpability to particular kinds of behavior. A criminal action is commenced by a representative of the state on behalf of us all. In contrast, claims of civil wrongdoing are often initiated by non-governmental officials. Civil wrongs, while wrong, are not wrong in the same way as are criminal acts, and hence, "we" the public have no role — historical, cathartic, educative, controlling, improving accuracy, interactive or generative — to play on the civil side.

This account fails, however, to consider the difficulty in distinguishing between criminal and civil wrongs. How do we know to call a lawsuit "criminal" or "civil"? The identity of the parties is insufficient, because government may initiate both "criminal" and "civil" actions against individuals or entities. The remedies sought are also inadequate tests; individuals may be confined both "civilly" and "criminally" and can be required to pay "criminal fines" or "civil penalties." The challenged behavior fails to provide sure guidance, because the very same activities may violate both criminal and civil laws.⁷⁷ Even the title of a statute under which a case is initiated proves unreliable, for the "civil label is not always dispositive."⁷⁸

Take a recent discussion of the labeling problem, *Allen v. Illinois*.⁷⁹ The state charged a defendant, Terry Allen, with being a "sexually

76. For further discussion of the utility and disutility of the criminal/civil distinctions in procedure, see R. COVER, O. FISS, & J. RESNIK, *PROCEDURE* [forthcoming 1988]. Note that another distinction of formerly great import to procedure — that between "equity" and "law" — was diminished by the promulgation of the Federal Rules of Civil Procedure in 1938. FED. R. CIV. P. 2 states that there shall be "one form of action." See Clark & Moore, *A New Federal Civil Procedure — I: The Background*, 44 YALE L.J. 387, 415-35 (1935) (urging a single set of rules); *Simplifying Procedures in Federal Courts*, 2 U.S.L.W. 866 (May 14, 1935) (address of Chief Justice Hughes to the American Law Institute). The Federal Rules of Appellate Procedure, promulgated in 1967, apply to both criminal and civil appeals. See Order of December 4, 1967, 389 U.S. 1065 (1967).

77. Note, *Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions*, 98 HARV. L. REV. 1023 (1985).

78. See *Allen v. Illinois*, 106 S. Ct. 2988, 2992 (1986) (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

79. 106 S. Ct. 2988 (1986).

dangerous person," but contended that its charge was civil, not criminal. The defendant argued that he was facing criminal charges and should therefore be able to assert a fifth amendment right against self-incrimination. Justice Rehnquist, writing on behalf of a five person majority, concluded that because the Illinois legislation was aimed at "treating" — rather than "punishing" — Mr. Allen, the action was "civil."⁸⁰ In contrast, Justice Stevens, on behalf of the four dissenters, believed that the "substance of the Illinois procedure" and the fact that, if found to be a "sexually dangerous person," Mr. Allen could be placed in a maximum security prison, required that he be afforded the protections of the fifth amendment.⁸¹

Of course, *Allen v. Illinois* illustrates the problems of using dichotomies. As the dissent pointed out, the Illinois procedure was "neither wholly criminal nor civil."⁸² That comment has application beyond the context of those charged with being "sexually dangerous." If by "criminal" actions we mean to denote those proceedings at which we should protect individuals from government overreaching, then we should be concerned when the powerful adversary can obtain either "punitive" incarceration or "rehabilitative" detention.⁸³ And why not worry when the state as adversary seeks to terminate the rights to parent,⁸⁴ or to receive welfare benefits⁸⁵ or to revoke licenses for jobs?⁸⁶ Further, the state is not the only powerful adversary. "Private" litigation can result in the end of parental rights, the transfer of assets, the stigmatization of individuals, or the vindication of rights. Whether called "criminal" or "civil," adjudication is that process by which government-empowered officials impose decisions upon disputants. If there is a role for the public when John Paul Stevenson is accused of a crime, there is a role for the public when Terry Allen is charged,

80. *Id.* at 2994.

81. *Id.* at 2995-97.

82. *Id.* at 2999 (Stevens, J., dissenting). The Court has also noted that habeas corpus proceedings fall somewhere in between. *See Resnik, Tiers*, 57 S. CAL. L. REV. 847, 920-26 (1984). Federal prisoners who seek one form of habeas corpus (via 28 U.S.C. § 2255 (1982)) file what are called (since 1977) post-trial motions in their criminal cases. However, when habeas corpus petitions are filed pursuant to 28 U.S.C. § 2241 (1982), new "quasi-civil" actions are commenced. *See Harris v. Nelson*, 394 U.S. 286 (1969).

83. The majority in *Allen v. Illinois* sought to determine whether the legislation was "punitive" in "either purpose or effect," or if the legislation was aimed at "treating" an individual. 106 S. Ct. at 2992-94.

84. *See Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981).

85. *See Goldberg v. Kelly*, 397 U.S. 309 (1970).

86. *See Steadman v. SEC*, 450 U.S. 91 (1981).

when victims of domestic violence seek help from the state, and when the Whiteheads and Sterns attempt to obtain legal recognition of their rights.⁸⁷

Another line frequently drawn is between trials, or trial-like activities,⁸⁸ and other forms of adjudication, such as decisions on motions to dismiss or for summary judgment. At first glance, trials and evidentiary hearings appear to be the obvious occasions upon which to invite the public. Several factors support the inclusion of the public: recall Chief Justice Burger's history, as well as the potential for drama that accompanies the giving of testimony and the exercise of state power when verdicts are rendered. But witnesses testify not only at trials but also at depositions, and judgments are rendered not only after live testimony, but also after the submission of papers. There are adjudicative instances other than trial, and to complicate matters further, there are dispositions other than by adjudication.

87. Courts have, in fact, gone beyond *Richmond Newspapers* to recognize rights of access to a variety of hearings and to some of the documents filed in court. The Court has mandated access to preliminary hearings in criminal cases, see *Press Enterprise Co. v. Superior Court*, 106 S. Ct. 2735 (1986), and to hearings on suppression motions, see *Waller v. Georgia*, 467 U.S. 39 (1984). Cf. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (first amendment does not prohibit protective orders sealing discovery materials); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (no access to copy tapes that had belonged to the President).

For a sampling of some of the lower courts' responses, see *In re Washington Post Co.* (United States v. Soussoudis), 807 F.2d 383, 389 (4th Cir. 1986) (right of access to plea, sentencing hearing, and to documents filed in connection with such hearings; claim of national security does not warrant closure without procedural safeguards); *United States v. Smith (In re Patriot News Co.)*, 776 F.2d 1104, 1111 (3d Cir. 1985) (access to bill of particulars); *United States v. Martin*, 746 F.2d 964 (3d Cir. 1984) (presumption of access to all judicial records, including those not admitted into evidence); *Joy v. North*, 692 F.2d 880 (2d Cir. 1982) (access to report of special litigation committee in shareholder derivative action), *cert. denied*, 460 U.S. 1051 (1983). But cf. *United States v. Anderson*, 799 F.2d 1438 (11th Cir. 1986) (newspaper had no right of access to list of unindicted co-conspirators in bill of particulars), *cert. denied*, 107 S. Ct. 1567 (1987); *In re Reporters Committee*, 773 F.2d 1325 (D.C. Cir. 1985) (no constitutional or common law right of contemporaneous access to documents relied upon when judge rules on summary judgment); *Seattle Times v. Eberharter*, 105 Wash. 2d 144, 713 P.2d 710 (Wash. 1986) (en banc) (no constitutional or common law right of access to affidavit, not filed but used to support a search warrant). For discussion of the standards by which to decide when closure would be permitted, see *In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984).

88. See *United States v. Smith (Doe)*, 787 F.2d 111 (3d Cir. 1986) (access to side bar conferences held to discuss evidentiary issues in criminal case); *In re Herald Co.* (United States v. Klepfer), 734 F.2d 93, 98 (2d Cir. 1984) (constitutional right of access to "many aspects of a criminal proceeding"); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (first amendment and common law right of access to civil proceedings in a hearing on a motion for a preliminary injunction); *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983) (constitutional right of access to bail hearing).

In the federal system, fewer than five percent of all civil cases and thirteen percent of criminal cases reached trial in 1985.⁸⁹ Some cases were settled by mutual consent of the parties, others were withdrawn, and still others terminated by dispositive rulings made by trial judges.⁹⁰ With the advent of the Federal Rules of Civil Procedure came mechanisms that have increased the potential for a diffuse, rather than concentrated, mode of adjudication.⁹¹ And with contemporary perceptions of large caseloads come increasing pressures for non-adjudicative means by which to dispose of cases.

As I noted at the outset, enthusiasm for alternative dispute resolution has given federal judges a role as sponsors of ADR and facilitators of settlement.⁹² Under the umbrella of "courts," we find not only adjudication and withdrawal of lawsuits, but also many intermediate steps, such as court-annexed arbitration, summary jury trials, mediation, and judicial settlement conferences.⁹³ Some commentators argue for expanded use of these procedures to augment or to replace adjudication.⁹⁴ Just as one might be tempted to draw a line between trials and other modes of adjudication, why not distinguish between adjudication and settlement? After all, adjudication is that moment when judges impose outcomes enforced by the state, while settlements are only agreements reached by parties.

The difficulty here is that both adjudication and settlements achieved after lawsuits are filed may well be mixtures of "public" and "private" decisionmaking. Even if one wished to confine a public dimension to only those instances when norms are being applied, when

89. ADMINISTRATIVE OFFICE OF U.S. COURTS, ANALYSIS OF THE WORKLOAD OF THE FEDERAL COURTS FOR THE TWELVE MONTH PERIOD ENDED JUNE 30, 1985 [hereinafter U.S. WORKLOAD, 1985] at Table C-4 (4.7% of all civil actions reached trial) and Table D-4 (extrapolated, 12.7% of all criminal defendants reached trial). In this comparison, the civil actions are counted by case whereas the criminal statistics are tabulated by defendant, rather than by case.

90. See generally Ordinary Litigation, *supra* note 28; Kerwin, Henderson, & Baar, *Adjudicatory Processes and the Organization of Trial Courts*, 70 JUDICATURE 99 (1986).

91. See Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824-26 (1985); Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986).

92. See generally Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 534-40 (1986).

93. D. HENSLER, A. LIPSON, & E. ROLPH, JUDICIAL ARBITRATION IN CALIFORNIA (Inst. for Civil Justice, Rand Corp. 1981); D. HENSLER, WHAT WE KNOW AND DON'T KNOW ABOUT COURT-ADMINISTERED ARBITRATION (Inst. for Civil Justice, Rand Corp. 1986).

94. See Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981).

education, accuracy, or control is needed, when interaction will assist and inform norm generation, one must acknowledge that such instances occur at summary judgment and settlement as well as at trials and adjudication.

When filing a complaint, a plaintiff defines the limits of a court's inquiry. When answering, a defendant limits that inquiry further by admitting certain facts or issues. By stipulations of law or fact, the parties may further circumscribe the arena in which the judge or jury acts. Under the Federal Rules of Civil Procedure, a trial judge is supposed to make "findings of fact" and "conclusions of law."⁹⁵ I have written documents called "proposed findings of fact and conclusions of law," after which a trial judge has whited out the word "proposed" and signed his name. While adopting parties' submissions in this fashion may not endear a trial judge to an appellate court,⁹⁶ the document generated nevertheless bears the title "judgment," and we say that adjudication has occurred. Further, parties may "consent" to the entry of judgment, and once again the documents become "judgments" even though the words may be written by the parties.⁹⁷

On the other side, "private" settlements may also be formulated with substantial judicial input. In many instances, lawsuits are filed, the parties litigate some issues, and then come to an agreement. A judge's ruling on a contested but non-dispositive issue may be pivotal to a subsequent settlement. Even without adjudication, judicial commentary on the case may profoundly influence the agreements reached.⁹⁸

I am not alone in noticing the problems of capturing what might be meant by the term "judicial action." In *Janus Films, Inc. v. Miller*,⁹⁹ the Court of Appeals for the Second Circuit struggled to delineate instances of judicial action from those for which the parties bore responsibility. The question was whether an individual was bound by a judgment entered: had the parties consented, or had the judge adjudi-

95. FED. R. CIV. PRO. 52(a).

96. See *Kelson v. United States*, 503 F.2d 1291, 1294 (10th Cir. 1974) ("The mechanical adoption of a litigant's findings is an abandonment of the duty imposed on trial judges . . ."); *In re Colony Square Co.*, 819 F.2d 272 (11th Cir. 1987) (no per se reversal when litigant has ghost written a court's order); cf. *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985) ("[E]ven when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.").

97. See Resnik, *Judging Consent*, 2 U. CHI. LEGAL FORUM (forthcoming, 1987).

98. See Sarokin, *Justice Rushed Is Justice Ruined*, 38 RUTGERS L. REV. 431 (1986); Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986).

99. 801 F.2d 578 (2d Cir. 1986).

cated the matter? Hoping to mark the boundaries, Judge Jon O. Newman, writing for the Second Circuit, first defined adjudication as those instances when a

judge determines all aspects of the relief to be awarded and enters what has been called an adjudicated judgment The wording of such a judgment is determined by the judge, who may draft it, accept the draft proposed by the winning party, or adopt portions of draft language proposed by any of the parties.¹⁰⁰

The alternatives are forms of settlement. The parties may settle and the judge may sign a stipulation of dismissal.¹⁰¹ If the parties agree to settle but want a court order, the court may enter a consent judgment. Here the Second Circuit drew new lines. In a "true consent judgment," "all the relief to be provided by the judgment is agreed to by the parties. The court makes no determination of the merits of the controversy or of the relief to be awarded."¹⁰² In contrast, in a

"settlement judgment" the parties have agreed on the components of a judgment, including the basic aspects of relief, but have not agreed on all the details or the wording The components . . . are . . . reported to the court on the record [and] . . . the judge is obliged to determine the detailed terms of the relief and the wording of the judgment.¹⁰³

Janus Films helps us understand that judges do a lot of adjudicatory-like activity, not all of which falls under the category of what the Second Circuit called an "adjudicated judgment."¹⁰⁴ From other commentary, we know that judges do a lot of advising/adjudicating, not

100. *Id.* at 581-82.

101. FED. R. CIV. P. 41.

102. 801 F.2d at 582.

103. *Id.* The court provided yet another set of distinctions to resolve the issue of whether judgments must include side agreements that permit payments of amounts less than those stated on the face of the judgment. The court distinguished between "private judgments" (involving "a tort or a breach of contract") and "public judgments" (such as the *Janus* case, in which "a judgment resolves a dispute concerning a copyright that may be enforced against other members of the public"). *Id.* at 584-85. Cf. Green, *Tort Law: Public Law in Disguise, Parts I and II*, 38 TEXAS L. REV. 1, 257 (1959), reprinted in L. GREEN, *THE LITIGATION PROCESS IN TORT LAW* (1965).

104. See also *Huertas v. East River Housing Corp.*, 813 F.2d 580 (2d Cir. 1987) (trial judge deeply involved in settlement impermissibly ordered the payment of attorneys' fees).

all of which is transformed into "judgments."¹⁰⁵ Social scientists remind us that mediators invoke norms in their efforts to assist parties in reaching compromises¹⁰⁶ and that participants in bilateral negotiations also rely upon norms embedded in their social context.¹⁰⁷ Publicly-empowered officials do much of their decisionmaking outside the context of trials and of formal adjudication.¹⁰⁸

IV. THE PROBLEMS OF A PUBLIC DIMENSION

I have shown how some traditional distinctions do not answer the question of what kind of adjudicatory-based decisions could be understood as including a public dimension. I would be remiss, however, if I failed to point out the limits of my own comments. First, my focus has been on court-based activity. There is "public" decisionmaking in institutions other than courts; indeed, much of what agencies do is adjudicatory in nature.¹⁰⁹ The Social Security Administration alone disposes of more cases in a single year than do all federal trial judges combined.¹¹⁰ Thus, if claims for a public dimension persuade, such a dimension should be considered in other institutions.

105. See, e.g., *Edwards v. Born, Inc.*, 608 F. Supp. 580 (D.V.I. 1985), *vacated and remanded*, 792 F.2d 387 (3d Cir. 1986); Menkel-Meadow, *supra* note 14; Peckham, *supra* note 94; Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

106. See Sibley & Merry, *Mediator Settlement Strategies*, 8 LAW & POLY 7 (1986); Plett, *Mediation and Settlement of Building Construction Disputes: The Case of the "Bau-Schlichtungsstelle"* (Inst. for Legal Studies, Union of Wis., Dispute Processing Research Program, Working Papers Series 7, Mar. 1986); Bernard, Floger, Weingarten, & Zumeta, *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, in ETHICS, STANDARDS, AND PROFESSIONAL CHALLENGES 61 (J. Lemmon ed. June, 1984).

107. See Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

108. See Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161 (1986); Sarokin, *supra* note 98; see also *Kothe v. Smith*, 771 F.2d 667 (2d Cir. 1985) (judge impermissibly imposed sanctions when litigants refused to settle at the time the judge suggested).

109. In 1984, there were 515 Article III trial judges and 1121 administrative law judges. See 1984 ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORT OF THE DIRECTOR 129 (1984) [hereinafter U.S. WORK LOAD 1984]; Lubbers, *Federal Agency Adjudication: Trying to See the Forest and the Trees*, 31 FED. BAR NEWS & J. 383 (1984).

110. In 1984, the Social Security Administration made 337,459 dispositions. SOCIAL SECURITY ADMINISTRATION OFFICE OF HEARINGS & APPEALS OPERATIONAL REPORT 26 (Sept. 1984). In 1984, federal trial judges disposed of 243,000 civil cases and 44,501 "defendant dispositions." REPORT OF DIRECTOR, *supra* note 109; U.S. WORKLOAD, 1985, *supra* note 89, at 179 (note again that civil action dispositions are measured by "cases" while criminal action dispositions are measured by "defendants").

Second, if lawsuits are important moments that implicate the public, so are many disputes that are never transformed into lawsuits. Disputes on both sides of the line marked by the filing of a complaint can be identical in relevance to the public. The category "lawsuit" is both under and over inclusive of the conflicts in this society important to us all. In defense of drawing that line, I can say that once a lawsuit has been filed, we know at least one of the disputants has claimed that public norms govern a conflict. Further, we conserve the costs of searching to find disputes because a participant has brought the conflict forward. Moreover, one of the disputants has weighed the personal and the public elements of the dispute and has opted in favor of an appeal to the public. Nonetheless, using the filing of a lawsuit as a trigger for a public dimension remains problematic.

Third, given the many "publics," surely there will be conflict about the value of a public dimension. What about the public's interest in providing inexpensive and speedy dispute resolution? Wouldn't the acknowledgment of a public dimension slow the process? Increase the costs? Expense is often waved as a flag in the world of due process. But costs in and of themselves cannot be a total trump. It would be inexpensive to flip a coin to reach a judgment, but coin flipping is considered inappropriate behavior for judges.¹¹¹ The real question, of course, is one of costs and benefits, and the answers are subjective and depend upon what one counts as costs and benefits.¹¹² For example, we know that parties to lawsuits sometimes bargain for secrecy in exchange for money.¹¹³ Depending upon how we were to provide for a public dimension, we might preclude such bargains.¹¹⁴ Such a rule could have an impact on the kinds of cases filed and on the kinds of bargains struck.¹¹⁵ Should such a result be characterized

111. Shipp, *Friess is Barred from Ever Being New York Judge*, N.Y. TIMES, Apr. 7, 1983 at B3, col. 1 (New York judge flipped coin to decide whether to sentence an individual to ten or to twenty days. "Abdicating such solemn responsibilities . . . is inexcusable . . .").

112. Costs are typically calculated only by estimations of the price of reaching a decision by a particular procedure. This narrow view of costs can be contrasted to an estimation that would include the costs of erroneous decisionmaking as well as an estimation that would comprehend non-monetizable "costs." See Mashaw, *supra* note 4.

113. See the recent reports of litigation involving alleged defects in cigarette lighters. Lewin, *Bic Is Facing a Rising Tide of Personal Injury Suits*, N.Y. Times, April 10, 1987, at 1, col. 4; Gilpin, *Bic Says There are 42 Suits*, N.Y. Times, April 17, 1987, at 29, col. 1.

114. See, e.g., *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339 (3d Cir. 1986) (access to settlement agreement filed with the court).

115. See *Janus Films*, 801 F.2d at 585

If the parties to a dispute . . . are reluctant to disclose the terms of their agreements

as a "cost" or as a "benefit"? The answer might well depend upon the kind of case, the nature of the bargain, and the relative capacity and resources of those who bargain.

Fourth, recognition of a public dimension may well spark concern about litigants' autonomy. If parties consent to the withdrawal of a lawsuit, why might the public have an interest? Unlike some commentators,¹¹⁶ I am not sanguine about party consent. We know that litigation is expensive, that lawyers do not always serve their clients' interests, and that litigants are often risk-adverse.¹¹⁷ Given these conditions, "consent" is problematic and does not for me resolve the question about whether a dispute has a public dimension.

But what about privacy? Parties are not required to file lawsuits. If they decide to forego adjudication, why should the public claim any role? Lawsuits can involve issues of great personal moment; to borrow my colleague Margaret Jane Radin's term, one's "personhood" may well be at stake.¹¹⁸ The thought that uncaring others might have access to details of one's most intimate actions may well deter many from seeking judicial remedies. If public participation were permitted at all moments, many might retreat still further. Can an abstract principle of a "public dimension" justify such intrusions?

One response is that the pain of court processes is not limited to lawsuits of any particular genre or to trials as contrasted with filed complaints. Terry Allen, the "civil" defendant accused of being a "sexually dangerous" person, may well have been disheartened by the prospect that the public could learn about his alleged misbehavior. Every woman who has been a plaintiff in a lawsuit seeking an abortion or claiming injury from an intrauterine device must feel the pain of having the personal thrust so unequivocally into the realm of the political. Others may gain from the stories told, but those whose lives are the bases for the sagas may well have contributed with anguish. Yet, recognition of a public dimension does not demand that personal interests have no sway. One need not conflate the personal and the

. . . , they remain free to forgo entry of a judgment and settle their litigation by a withdrawal of action, keeping confidential all aspects of their settlement. They may not, however, secure a judicial imprimatur for an obligation that the parties have agreed means less than its terms state.

116. Easterbrook, *Justice and Contract in Judgments*, 2 U. CHI. LEGAL FORUM (forthcoming 1987).

117. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987).

118. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

private, the totalitarian and the public.¹¹⁹ To acknowledge a public dimension is not to obliterate any sensitivity to the personal elements that ought to be considered when deciding how to provide process and how to create a role for the public in a particular case.¹²⁰

V. THE FORMS OF PARTICIPATION

Conceiving of a role for the public at trials makes the question of the forms of participation simple. Trials can occur in front of an audience; the public, or a subset thereof, may sit, watch, recount, listen, and respond. But if one considers the possibility of other instances (such as when judges decide summary judgment motions or discuss settlement with parties) as moments in which the public has some role, the question of the form of participation seems far more complex. Should we require judges to work in open offices? Should we mandate that litigants discuss settlements in places where strangers can listen? Should jury deliberations be open?¹²¹ Or can we conceptualize a role for the public that goes beyond the tradition of "access" to the courts?

119. Cf. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429, 1440 (1982) ("To what extent should individual interests be subordinated to collective control?"). Compare Gavison's discussion of the private, *supra* note 74.

120. Even within a tradition of access to trials, courts have sanctioned many closures. See, e.g., *Ex Parte Quirin*, 317 U.S. 1 (1942) (upholding secret military trial of individuals captured in the United States and charged with sabotage), *In re Reporters Comm.*, 773 F.2d 1325 (D.C. Cir. 1985); cf. *In re Oliver*, 333 U.S. 257 (1948) (secret trial of defendant for criminal contempt intolerable); *Dammerau v. Commonwealth*, 3 Va. App. 285, 349 S.E.2d 409 (1986) (finding no violation of a state constitutional right to a public trial by a trial held in correctional facility to which there was limited access). For discussion of the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-11, see *United States v. Belfield*, 692 F.2d 141 (D.C. Cir. 1982); Kornblum & Jachnycky, *American's Secret Court: Listening in on Espionage and Terrorism*, 24 JUDGES' JOURNAL 15 (Summer 1985). See also *The First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467 (3d Cir. 1986) (Pennsylvania statute limiting public access to disciplinary files of judges not unconstitutional); see generally Shaman & Bégué, *Silence Isn't Always Golden: Reassessing Confidentiality in the Judicial Disciplinary Process*, 58 TEMP. L.Q. 755 (1985); Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1 (1985).

Moreover, were we genuinely concerned about the pain of adjudication, we would turn our attention not only to public involvement in the process but would also want to consider how litigants experienced other aspects of their interaction with the judicial system.

121. While jury deliberations are generally secret, see *Inside the Jury Room* (PBS "Frontline" Documentary) (videocassette available from PBS) (jury deliberations recorded on camera). See also *United States v. Barnes*, 604 F.2d 121, 140-41 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980) (jurors' identity concealed).

I like to think that a public dimension does not collapse into claims about "publicity" or "dissemination." Although both may be aspects of public dimensions to procedure, neither are the complete account nor necessarily required at every occasion. This is not the place in which to provide a list of ways to express a public dimension. Rather, I ask consideration of the public aspect of due process as the new institutions of dispute resolution are being installed in our courts and as courts defer to other modes of decisionmaking.

The Supreme Court recently decided that contracts for arbitration between customers and brokerage firms must be enforced, despite customers' desires to go to court and despite claims of inequality of bargaining power.¹²² Are we, the public, to participate in such procedures? Further, we must ask those who advocate increased use of judicial settlement conferences, of court-annexed arbitration, of mediation: are mechanisms provided for public accountability, for control and education? How will the decisionmakers decide what compromises to suggest? What provisions are there for the creation of shared stories? Are records kept? Are aggregate data collected and reported? Are random cases sampled and reviewed? How does one envision that norms will develop or shift? Is the assumption that traditional adjudication will continue to be the locus for norm generation? Who will decide which cases merit the "trial" track and which will be sent to other, less visible modes of decisionmaking? Alternatively, is the assumption that, in presumptively less "adversarial" moments, the public has no interest? Or is the assumption that the interest is already represented by those present?

VI. CONCLUSION

If one believes that law exists independent of the moments when legal rules are applied to facts, that adjudication is not a political act, and that state-empowered judges and their surrogates are not political actors, one might pay little attention to legal processes. But many who urge us to reconceive of our legal processes do not make such claims. Thus, we must ask them: is any commitment made to a public dimension, or what explains the decision to ignore that aspect of due process?

122. *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987). Arguments in favor of expanded use of arbitration are set forth in Fletcher, *Privatizing Securities Disputes through the Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393 (1987).

